

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

|                                    |   |                         |
|------------------------------------|---|-------------------------|
| <b>MASTEC ADVANCED</b>             | ) |                         |
| <b>TECHNOLOGIES, a division of</b> | ) |                         |
| <b>MASTEC, INC.</b>                | ) | <b>Case 12-CA-24979</b> |
|                                    | ) |                         |
| <b>and</b>                         | ) |                         |
|                                    | ) |                         |
| <b>JOSEPH GUEST, an Individual</b> | ) |                         |
|                                    | ) |                         |
| <b>DIRECTV, INC.</b>               | ) | <b>Case 12-CA-25055</b> |
|                                    | ) |                         |
| <b>and</b>                         | ) |                         |
|                                    | ) |                         |
| <b>JOSEPH GUEST, an Individual</b> | ) |                         |

**MASTEC ADVANCED TECHNOLOGIES' ANSWERING BRIEF TO  
EXCEPTIONS MADE BY THE GENERAL COUNSEL TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

Dated: April 14, 2008

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**MASTEC ADVANCED TECHNOLOGIES' ANSWERING BRIEF TO  
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**I. INTRODUCTION**

Respondent MasTec Advanced Technologies (“MasTec” or “the Company”) files this Answering Brief to the General Counsel’s Exceptions to the Administrative Law Judge’s Decision dated January 4, 2008.

General Counsel excepts to several of the Administrative Law Judge’s (“ALJ”) credibility determinations, factual findings and legal conclusions. Some of those exceptions are not particularly significant to the actual issue before the Board. The primary question presented to the Board in this case is whether a group of 26 MasTec technicians retained the Act’s protection after participating in an on-camera meeting during which they publicly disparaged and were disloyal to their employer (Respondent MasTec) and their employer’s only customer in the market (Respondent DirecTV, Inc. (“DirecTV”)). The ALJ correctly found that:

[T]he statements broadcast in the Channel 6 news story

were so “disloyal, reckless and maliciously untrue” as to lose the Act’s protection.

Therefore the ALJ ruled that MasTec acted lawfully when it terminated the technicians’ employment for their participation in the broadcast. The ALJ’s well-written and well-reasoned decision must be affirmed, for the reasons set forth below.

## **II. OVERVIEW OF THE CASE**

MasTec employs satellite television technicians responsible for installing, upgrading and servicing DirecTV satellite television systems. DirecTV is MasTec’s only customer in the Orlando, Florida market. In March of 2006,<sup>1</sup> after months of concerted complaints about performing an essential function of their job, a group of MasTec technicians decided to take their complaints to the media. The group conspired to travel to WKMG Channel 6 (“Channel 6”) in Orlando during working time, dressed in their DirecTV uniforms and in a caravan of DirecTV trucks, to meet on-camera with reporter Nancy Alvarez. The technicians told Alvarez that MasTec and DirecTV were making them lie to customers; that customers had to pay for DirecTV services they may never use; that critical features of the DirecTV system – those provided as part of the standard system installation package – were not necessary; and that MasTec supervisors told them to tell customers their DirecTV receivers would blow up if not properly installed. The assertions of the General Counsel aside, some technicians have admitted that they lied to Alvarez.

One month after the on-camera meeting, Channel 6 aired a series of stories purporting to reveal DirecTV’s “dirty little secret.” The stories, featuring the group of MasTec technicians, aired a total of five times over a four-day period. MasTec received

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<sup>1</sup> All dates are 2006, unless otherwise indicated.

calls from customers demanding cancellation of their DirecTV service and the Florida Attorney General's Office initiated an investigation into DirecTV's practices as a result of the broadcasts. On May 3, MasTec terminated the employment of the technicians who participated in the on-camera meeting for publicly disparaging MasTec and its only customer in the Orlando market – DirecTV.

At no time between the March on-camera meeting and May broadcasts did any of the technicians attempt to correct or clarify with the reporter the false statements made by their colleagues during their meeting at the Channel 6 studios, nor did any of the technicians tell MasTec they had been to the station at all. Following the broadcasts, none of the technicians contacted anyone from MasTec to clarify or retract any portion of the broadcast, or to attempt to disassociate themselves from the reports. To the contrary, even at the time of the trial in this case, more than one year after the terminations, the technicians who testified supported the broadcasts in full.

The ALJ correctly found that the technicians lost the Act's protection as a result of their communications with the television reporter, and that their terminations were therefore lawful. The ALJ's Decision, which is consistent with Board precedent, must be affirmed.<sup>2</sup>

### **III. SPECIFIC FACTS**

#### **A. MasTec's Business And Relationship To DirecTV.**

MasTec is an "infrastructure company" working in the utility,

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<sup>2</sup> The ALJ additionally found that MasTec did not threaten technicians with discharge or discharge technicians for concertedly complaining about wages, hours and working conditions as alleged in the Complaint. (Administrative Law Judge's Decision 16, 17 (hereinafter "ALJD \_\_\_\_")) General Counsel did not except to these findings. The ALJ also found that in 2006 MasTec maintained an unlawful solicitation policy (although it was never enforced), and that a single MasTec supervisor, not involved in the remainder of the issues discussed herein, implied facility closure during a telephone conversation with a single employee. (ALJD 16) MasTec does not except to these findings, but argues against the nationwide notice posting urged by General Counsel.

telecommunications and power energy fields. (ALJD 5; Tr. 120)<sup>3</sup> A significant part of MasTec's business involves installing, upgrading and servicing DirecTV television satellite systems through its Advanced Technologies Division, the Employer in this case. (ALJD 5; Tr. 122) MasTec is a DirecTV home service provider or "HSP." (ALJD 5; Tr. 32-33) DirecTV subcontracts all of its satellite system installation work to HSPs throughout the country. (Tr. 32-33) DirecTV HSPs are prohibited from working for any other satellite television provider. (ALJD 5; Tr. 33) MasTec represents approximately 30% of DirecTV's HSP system nationwide. (ALJD 5; Tr. 35)

The MasTec-DirecTV relationship is governed by a contract which, in March 2006, was entitled the "DirecTV, Inc. 2005 Home Service Provider Agreement." (ALJD 5; Tr. 34-35; GC 2) The contract sets forth the terms and conditions of the MasTec-DirecTV relationship, including:

- The fees payable to MasTec from DirecTV for completion of work orders. (GC 2, p. 5)
- An exclusivity provision, which prohibits MasTec from performing work for any other satellite system provider. (GC 2, p. 8)
- A list of dedicated management areas ("DMAs").<sup>4</sup> (GC 2, pp. 17-18)
- The Statement of Work, which sets forth the requirements for all residential installations. (GC 2, pp. 19-21)
- The Contractor Installation and Service Responsibilities. (GC 2, p. 26)
- Performance Standards. (GC 2, p. 33-34)

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<sup>3</sup> Citations to the hearing transcript appear as "Tr. \_\_\_\_." Citations to General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision appear as "GCB \_\_\_\_."

<sup>4</sup> Orlando is its own DMA. (Tr. 88, GC 2, p. 17)

- A Customer Installation/Service Satisfaction Checklist. (GC 2, p. 35)

Under the HSP Agreement, DirecTV pays MasTec by the job. (Tr. 37) The Agreement also gives DirecTV the right to take a service territory away from MasTec if DirecTV is unhappy with the Company's performance. (ALJD 5; Tr. 82) In fact, DirecTV eliminated a MasTec service area in New Jersey in 2004 because MasTec was not meeting DirecTV's performance standards in that market. (ALJD 5; Tr. 571-572) DirecTV is not, however, involved in or responsible for the hiring, firing or compensation of MasTec employees. (Tr. 69)

DirecTV work comprises 100% of MasTec's business at its Orlando, Florida facility, where in 2006 MasTec employed over 100 satellite television technicians. (ALJD 5; Tr. 122) The MasTec management team in Florida was the same at the time of trial as it was during the relevant period in 2006. Helbert Villa, Senior Technical Supervisor, supervised technicians at the Orlando facility. (ALJD 5; Tr. 122, 192) Villa reported to Christopher Brown, Operations Manager for North Florida. (ALJD 5; Tr. 122, 172) Brown reported to Regional Vice President, Gus Rey (Tr. 97), who reported to Senior Vice President of MasTec Advanced Technologies, Mark Retherford. (Tr. 87, 97)

#### **B. The Technicians' Daily Work Duties**

Technicians are responsible for installing, servicing and upgrading DirecTV systems in customers' homes. They are paid on a piece rate system – the more jobs they complete, the higher their wages. (Tr. 93) On a typical day, technicians report to the Orlando facility around 7:00 a.m. to pick up their route schedules and the equipment they will need for the day. (ALJD 6; Tr. 594-595) Jobs are assigned to technicians in one of two time frames: "A.M." and "P.M." (ALJD 6; Tr. 588) The A.M. time frame runs



from 8:00 a.m. until 12:00 p.m., and the P.M. time frame runs from 1:00 p.m. until 5:00 p.m. (ALJD 6; Tr. 588) Technicians are expected to be at their first A.M. appointment at approximately 8:00. (Tr. 544)

When a technician enters a customer's home to perform an installation, he or she is expected to review the order with the customer; determine from the customer where the receiver will be located, and where the televisions to be outfitted are located. (ALJD 6; Tr. 123, 595) When performing the installation itself, the technician normally drills holes in the floor and/or wall to run the required wiring, which includes coaxial cable and telephone lines.<sup>5</sup> The technician then contacts DirecTV, has the receiver activated and verifies the signal. (Tr. 123-124, 595) The technician also is required to educate the customer on how to use the product, and then have the customer complete various forms, including the Customer Installation/Service Satisfaction Checklist. (Tr. 124, 595; RM 3) The specific requirements of the installation process are included in the Statement of Work contained in the HSP contract. (GC 2, p. 19-21)

**C. Technicians Are Required to Connect Telephone Lines To The Receivers During Installation.**

**1. Technicians should connect telephone lines to 100% of the receivers they install.**

DirecTV requires MasTec to connect a telephone line to every receiver it installs.

(Tr. 89) The Statement of Work in the HSP contract provides:

(v) In all installations of DIRECTV systems where the customer has a phone line, whether working or not, contractor shall use the phone line to connect each and every DIRECTV [receiver] in such DIRECTV customer's premises. Contractor shall make every effort to have the

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<sup>5</sup> Sometimes homes are "pre-wired," meaning that someone, a building contractor for example, has already run the necessary wires inside the walls. (Tr. 132) If not, the necessary wiring, including the telephone line, is included in the box with the receiver. (Tr. 515)

DIRECTV [receiver] successfully pass a phone test and receive impulse authorization.

(GC 2, p. 27) The ALJ acknowledged that, based on the evidence, the telephone line connection “is vitally important to Respondent DirecTV and, by extension Respondent MasTec.” (ALJD 6)

Receivers that are connected to an active telephone line are known as “responders,” meaning that, after hook-up, the receiver responds to a signal sent by DirecTV via telephone line. (ALJD 6; Tr. 90) Receivers not connected to an active telephone line are known as “non-responders.” (ALJD 6; Tr. 90)

A telephone line connection is free to the customer with a standard DirecTV installation.<sup>6</sup> (Tr. 71; GC 2, p. 19) A charge to connect a telephone line is made only when such connection involves “custom work,” such as a “wall fish” or “wireless jack.” (ALJD 6; Tr. 91-92; RM 5) The purpose of the wall fish or wireless jack is cosmetic – so the customer will not see telephone lines on the outside of the walls. (Tr. 134-135)

The time it takes a technician to connect the required cables and wiring varies with the size and scope of the work order. For example, where a home is already “pre-wired,” it will take a technician less time to complete the job than when he is required to run the cable and wires in the first instance. (Tr. 132-133; 517-518) In older homes, the process takes significantly longer, especially if more than one television receiver is involved.

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<sup>6</sup> The Statement of Work provides:

Standard Receiver Hook-Up, Cabling and Antenna Mounting Requirements... 5.  
Connection to an active telephone line capable of dialing out. There is no additional charge to the customer for installation of a phone jack for this connection.

(GC 2, p. 19)

**2. Technicians are trained in all aspects of the installation process, including connecting telephone lines.**

MasTec technicians receive training when they begin working for the Company.

(ALJD 5-6) Because technicians are required to connect telephone lines to the receivers as part of the standard installation, technicians are specifically trained on how to connect the telephone lines. (Tr. 521-522) The ALJ found the following to be true as part of his decision:

It is undisputed that all of the training and the materials distributed to the technicians regularly reminded them of the importance of connecting phone lines to receivers as part of the installation process. In fact, virtually all of the training materials in evidence refer to connection of telephone lines as a mandatory part of the technicians' installation procedures.

(ALJD 6 and 6 n. 4) Such training and materials include:

- The installer Field Training Manual<sup>7</sup> (Tr. 521-523; 524; RM 11)
- DirecTV Standard Professional Installation Guidelines<sup>8</sup> (Tr. 580-581; RD 6, p. 27)
- "Tech Tips"<sup>9</sup> (ALJD 6; RM 4; Tr. 130, 529-530, 587-588)

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<sup>7</sup> The manual provides in relevant part:

BASIC INSTALLATION REQUIREMENTS... 9. Phone line must run from D-Mark to a biscuit jack behind the TV, NO EXCEPTIONS. Phone lines must still be run even if the customer does not have an active phone line at the home.

(RM 11)

<sup>8</sup> The Standard Professional Installation Guidelines clearly state:

Connection of the receiver to a telephone line is mandatory. Every effort must be made to connect the receiver to the customer's telephone line. ... [P]rogramming packages available to the customer are limited as not all services can be provided to a receiver not connected to a telephone line. Pay per view purchases must be made by calling customer service and are therefore more expensive than standard impulse purchases when no telephone is connected to the [receiver].

(RD 6, p. 27) (Emphasis in original)

<sup>9</sup> The Tech Tips introduced at the hearing as RM 4 all concern the mechanics of connecting telephone lines.

In addition to information about the mechanics of connecting telephone lines, technicians are trained on the reasons the telephone connection is necessary, including information they can share with the customers about important system functions available only with an active telephone connection. For example, technicians are shown a video produced by DirecTV concerning the importance of telephone line connections. (GC 3(a)) Specifically, the video explains:

- telephone lines may be used to download new software;
- telephone connections are used for impulse pay-per-view purchases;
- telephone connections will be mandatory for video on-demand to work; and
- telephone connections are necessary for the caller I.D. function to work (properly installed, caller I.D. appears on the television screen).

(GC 3(a), 3(b)) The General Counsel's witnesses testified that they watched this video while working for MasTec. (Tr. 241, 316-317, 385)

DirecTV and MasTec are aware that some customers would prefer not to hook up their receivers into their phone line. As a result, the video suggests to technicians that they can overcome customer objections to connecting the telephone line by educating the customer about the features available with a telephone line connection. The video also suggests that technicians tell the customer that DirecTV requires the technicians to connect the telephone lines. (GC 3(a), 3(b) p.2)

In addition to on-the-job training, training documents and training videos, Chris Brown testified, and former technician Joseph Guest affirmed, that telephone line connection was a common topic during weekly technician meetings. (Tr. 217-218, 241-

242, 516-517) The evidence is clear that the technicians were well aware of the telephone line requirements and expectations of both DirecTV and MasTec.

**D. MasTec Attempts To Improve Its Responder Rate.**

As of early 2006, MasTec was DirecTV's worst performing HSP in terms of percentage of active responder rates on telephone lines. (ALJD 7) At that time, DirecTV informed MasTec that DirecTV was going to begin charging MasTec when its responder rate dipped below 47%, though the technical contractual requirement remained at 100%. (Tr. 138) At the time in question, MasTec's responder rates were generally below 47%. In response to renewed pressure from DirecTV, MasTec instituted a payment policy to encourage technicians to perform the work that they were *already* being paid for and were *already* required to perform – connecting the telephone lines. (ALJD 7; Tr. 138-139)

On January 17, the Company issued its first, formal written communication to technicians and it explained the terms of the new policy during the course of employee meetings. (ALJD 7; GC 8) Several of General Counsel's witnesses specifically acknowledged receiving the memorandum that MasTec provided to the installers. (Tr. 216-217, 303, 451)

During the employee meetings that occurred about the new policy, Brown, Villa and other supervisors discussed in detail the features of the new policy, (Tr. 176, 193) including that technicians would be "charged back" \$5.00 for receivers not connected to a telephone line when they failed to connect lines to more than 50% of receivers in a one-month period.<sup>10</sup> (GC 8) Also discussed was a provision in the new policy that financial rewards would accompany successful telephone connections.

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<sup>10</sup> As previously noted, there also was an incentive-pay portion of the policy. (GC 8)

The General Counsel's witnesses testified that the technician group was in an "uproar" at the meetings and "went crazy" over the new policy. (Tr. 325, 485) The group complained that connecting 50% of responders was impossible because many customers had cell phones but no land lines, and that customers would take the telephone line out after it was installed. (ALJD 7; Tr. 176, 193, 304, 326) Chris Brown testified in response that the reason the Company required only 50% of receivers to be connected was precisely because it gave "a lot of leeway for cell phones here, and those customers that just don't have service, don't want service..." (Tr. 527)

Some technicians, the clear evidence aside and fairly amazingly, insisted that ensuring a telephone line connection was simply not part of their jobs. (Tr. 325-326, 480) Former Technician Delroy Harrison testified:

I can't convince [the customer] if it's something they don't want to do. There's no way. ... That's not my job. That's the person who sells – the seller should explain to the customer what the requirements are for this type of work. That's not my responsibility to convince the customer. I'm an installer to install the equipment.

(Tr. 394)

In response to the technicians' concerns, supervisors took additional time to address the issues and provided guidance on what the technicians could do to overcome customer objections to connection of the phone lines. Supervisor Miguel Cruz suggested that technicians need not specifically discuss the telephone line connection with the customer, or they could hard-wire the telephone jack into the wall. (ALJD 7-8; Tr. 219)<sup>11</sup> Villa reminded technicians that the policy required only 50% responders, not 100%,

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<sup>11</sup> Brown testified that hard-wiring the telephone jack is not uncommon or improper, as it allows the customer to keep his or her telephone jack free for other uses. (Tr. 531-533)

which would account for concerns about not being able to connect a telephone line in every case. (Tr. 597-598) Brown told technicians to educate customers on the features available with a telephone line connection: they could order pay-per-view shows through the remote control; they could take advantage of the Caller I.D. feature; and that DirecTV was offering on-demand viewing in the near future, which would require an active telephone connection. (Tr. 177) The Company also offered additional training on telephone line connections to any technician who wanted it. (Tr. 321-322)

The General Counsel focuses much of its case on one particular meeting among managers and technicians regarding telephone lines. At that meeting and despite being given (1) a list of reasons why the telephone connection was necessary and (2) tips for communicating with the customer, the technicians continued to complain about the difficulty of connecting the telephone lines. The meeting lasted for a considerable period of time, and the technicians continued to repeat the exact same complaints that Brown and others had already addressed. (Tr. 539) Brown finally responded by telling the technicians: “guys, you’ve got all this stuff. Get it done.” (Tr. 541) No supervisor at that meeting or otherwise told the technicians to “lie” to customers, (Tr. 541, 599) a fact corroborated by General Counsel’s own witness. (ALJD p. 8 n.6)

Ultimately, it became clear to Brown that the technicians understood the policy, they just did not agree with it.<sup>12</sup> (Tr. 540) In an effort to calm the waters, Brown attempted to add some “comic relief” to the meeting. He testified:

Well, you know, it – the meeting was, you know, wasn’t going anywhere. We’d done our best, and we gave the information out, and the information was received, and it

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<sup>12</sup> In fact, some of General Counsel’s witnesses admitted that they were not complaining because they did not *understand* the policy; they were complaining because they did not *agree with* the policy. (Tr. 263, 270-271, 462-463, 487)

just seemed like it would be a little bit of comic relief at this point, right? So amongst the – it might have been at a point where two or three technicians were coming back with same issues, you know, all at once. And I said, “well, what, guys? What do you want to tell them? Do you want to tell the customer if you don’t plug the phone line up, that it’s going to blow up?”

(Tr. 540) Brown testified that the technicians as a group laughed at his joke. He had to wait 30 seconds or so for the laughter to quiet down before continuing with his presentation. (Tr. 540) The ALJ found that “[s]everal of General Counsel’s witnesses admitted they laughed at this statement and believed Brown was joking.” (ALJD 8)<sup>13</sup> In fact, no technician admitted telling customers that the box would blow up if the telephone line was not connected. (Tr. 305, 459)

**E. Technicians Feel The Effects Of The New Responder Policy For The First Time In March.**

**1. The Events of Monday, March 27.**

As set forth in the January 17 memorandum, the new payment policy went into effect on February 1, and on March 10, technicians received their first paycheck reflecting the incentive pay portion (but not the payback portion) of the new policy. (Tr. 140; GC 8; RM 6) As further preparation for the next step, which would be the payback step, the Company issued another memorandum to employees on March 17. This memo was discussed during group meetings to reiterate the policy and to remind the technicians that they would be receiving their first check reflecting the charge-backs the following week, on March 24. (ALJD 8; Tr. 141-142; RM 6)

Even though they were told about and understood the new policy for weeks before feeling the effects of the charge-backs, the technicians became angry upon

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<sup>13</sup> Brown testified that there was no reason for the technicians to have taken his joke seriously; no box has ever blown up in the history of the Orlando facility. (Tr. 189)



receiving their March 24 paychecks. The following Monday morning, March 27, some 50-100 technicians gathered in the Orlando facility parking lot. (ALJD 8; Tr. 223, 306, 372) Helbert Villa went outside to speak with the technicians and was cursed and called names when he approached the group. (Tr. 194, 600, 604-605) The ALJ found:

There is no dispute that the technicians were upset and angry and voiced many of the same concerns they had expressed in team meetings and individually in the weeks preceding implementation of the new pay structure.

(ALJD 8) Villa tried for 40-60 minutes to calm the technicians before finally contacting Brown for assistance. (ALJD 8; Tr. 601) Importantly, he took no action against the employees despite their language and criticism.

When Brown arrived, the technicians complained to him about the exact same things that they had been complaining “over and over and over” about since January. (Tr. 546) The group was angry and many people were cursing. (Tr. 546-547)

Brown tried to calm the group down by going over the policy again. (Tr. 547) Around 10:00 or 10:30, “after getting nowhere with the technicians,” Brown went inside the office to call his supervisor, Gus Rey. (ALJD 9; Tr. 548) Upon his return outside, Brown spoke to a few of the technicians individually. (Tr. 550) He noticed that some of the technicians’ paychecks “looked kind of weird,” and he promised to further investigate the charge backs for those technicians. (ALJD 9; Tr. 550-551) It was also obvious to Brown that many of the technicians had not been keeping track of the numbers of telephone connections they made relative to the numbers of installations they performed while in the field. Brown promised to create a way for the technicians to track their responder rate in the field, and told them he would provide them with a tracking sheet the following day. (ALJD 9; Tr. 551)

As it got later in the morning, Brown became more concerned about waiting customers – the technicians were supposed to be at customer locations by 8:00 a.m. (some two to two and a half hours earlier). (Tr. 554) By 10:00 or 10:30, there were also technicians that did not have an issue with responders, but were “just kind of hanging around just for the show.” (Tr. 554) By 11:00, Brown had instructed the group several times that they had to go to work, but they would not go. (Tr. 555-556) Instead, as former technician Joseph Guest testified, they continued to complain and were “shouting” that they had to pay their bills but did not have the money. (Tr. 224) Former technician Delroy Harrison told Brown that he was not going back to work until the situation was resolved. (Tr. 332)

Finally, in an effort to get the waiting customers serviced, Brown got up on top of a van and instructed the technicians to return to work. Brown said that he had “his homework” and would return the following day with some answers. (Tr. 179-180, 555) Again no disciplinary action was taken under these circumstances.

Harrison was one of the last technicians to leave the parking lot. (Tr. 556) He showed Brown one of his morning work orders that required five receivers and told Brown that, if he could not get the telephone lines hooked up to all five receivers, he would unilaterally cancel the job. (Tr. 557) Harrison also told Brown that he couldn’t do any jobs where the customer did not have a telephone line. (Tr. 308-309) In response, Brown told Harrison that, if he did not want his job, there were others who would be willing to do it.<sup>14</sup> (ALJD 16) However, Brown took no disciplinary action against Harrison.

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<sup>14</sup> This exchange formed the basis of Complaint ¶ 8: that MasTec threatened employees with discharge for concertedly complaining about their wages. The ALJ dismissed this allegation, finding that Harrison was not a credible witness. (ALJD 16) The General Counsel did not except to these findings.

The remaining technicians finally rolled out of the office parking lot around 11:00 a.m. – three hours after they were scheduled to be at the first customers’ homes for morning installations. (ALJD 9 n.7; Tr. 268, 604) The entire scene was generally described by the former technicians and supervisors alike as: “heated” and “aggressive.” The technicians acknowledged being “frustrated,” “mad,” “angry,” and “upset.” They also admitted to cursing at supervisors. (Tr. 246, 331, 398) As previously noted, the Company did not discipline any of the technicians for rolling out to work three hours late on March 27, (Tr. 604) nor was anyone disciplined for their interactions with the Company supervisors.<sup>15</sup> (Tr. 187, 199-200, 201, 565, 604-605)

## **2. The Events of Tuesday, March 28.**

The following day, the technicians gathered in the parking lot again to wait for Brown. (Tr. 195) As promised, Brown arrived that morning with a “tracker” – a sheet the technicians could use to monitor their responder rates while in the field. (ALJD 9; Tr. 378-379, 552, 561) Brown also discovered a mistake in the Company’s internal responder calculation system that resulted in some technicians being charged back more than they should have. Correcting this mistake resulted in a pay change in favor of a number of technicians Company-wide, including two technicians in Orlando. (ALJD 9; Tr. 552-554)

Still, the technicians also wanted “an answer” from Brown about their pay. (Tr. 225) The ALJ found:

All of the witnesses who testified about this second day agreed that the exchange was much the same as the day before, i.e. the technicians still complaining, essentially,

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<sup>15</sup> In fact, Harrison testified that following the March 27 gathering, his work orders changed *to his benefit*. (Tr. 432-433)

that they should not be held responsible for non-responders because of circumstances beyond their control and Brown telling them that this is the way it's going to be and to just do it.

(ALJD 9) The Company did not discipline any of the technicians for comments made during the Tuesday gathering. (ALJD 10; Tr. 201, 565)

**F. The Technicians Publicly Protest MasTec's Responder Pay Policy Change.**

**1. A group of technicians contact WKMG Channel 6 in Orlando.**

Following the impromptu technician gatherings on Monday, March 27 and Tuesday, March 28, Joseph Guest, Frank Martinez, Hugh Fowler, Delroy Harrison and James [Hehmann]<sup>16</sup> discussed contacting the media relative to MasTec's responder pay policy. (ALJD 10; Tr. 226) Harrison testified that there were "several discussions" about going to the media. (Tr. 412) Ultimately the decision to contact the media was made by group consensus. (Tr. 249) Fowler's affidavit states:

After Brown refused to correct the situation, we started talking among ourselves about the [sic] pursuing another strategy. Some of us started calling news stations. Me, Frank Martinez and some others made the calls. We called Channel 6, Fox and Channel 9. We left messages that we were being victimized by our Employer, MasTec, and that money was being taken from our checks and we had no control over it, and that we needed someone to talk for us.

(Tr. 335-336) WKMG Channel 6 and reporter Nancy Alvarez responded to the technicians' pleas for a media spokesperson and agreed to meet with them. (Tr. 309)

The technicians decided to get the names and telephone numbers of all of their Orlando coworkers and to encourage them to attend an on-camera meeting at the television station. (Tr. 353) Fowler obtained a technician contact list from his supervisor

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<sup>16</sup> The transcript identifies this individual as "James Hannon" (Tr. 226) and "James Henry." (Tr. 275) MasTec believes the references are to James Hehmann.

by falsely telling him that he needed the list to solicit help from some of the technicians.<sup>17</sup> (Tr. 354) Martinez, Fowler and others contacted the Orlando technicians, seeking participants for the meeting. Some agreed to take part, (Tr. 273-274, 380, 464-465) while others refused.<sup>18</sup> (Tr. 464)

The technicians reached consensus that they would drive together from MasTec's Orlando office to Channel 6. (Tr. 423) They also reached consensus about what they would discuss with the reporter once they got there. (Tr. 257) The ALJ accurately described the technicians' execution of their plan on the morning of March 30:

There is no dispute that on March 30, the 27 technicians named in the original complaint, along with [Frank] Martinez, went to the TV station to meet with Alvarez. There is also no dispute that the technicians drove to the station in their DirecTV vans, wearing their DirecTV uniforms. Most of the technicians drove to the station from Respondent MasTec's offices [after reporting for work but] before starting their assignments for the day.

(ALJD 10) Upon arrival at the station, the technicians agreed to be interviewed on-camera. (ALJD 10; Tr. 274) Some technicians were provided with microphones, including Frank Martinez. None of the technicians protested or at any time stated that Martinez could not or did not speak for the group. (Tr. 278) Delroy Harrison testified that he supported everything that was said at the meeting. (Tr. 428)

The on-camera meeting with reporter Nancy Alvarez aired several times during the first week of May, approximately one month after the taping. (RM 8(a), 8(b))

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<sup>17</sup> Fowler admitted that he did not tell his supervisor the truth about why he wanted the employee contact list. (Tr. 354-355)

<sup>18</sup> A third group agreed to participate and went to the station, but then changed their minds and left before the group met with the reporter. (Tr. 287-279)

During the intervening time period, the technicians continued to stand by what was reported to the public. Harrison testified:

Q: And while you were in the studio, what you told us earlier that you had said to Mr. Brown, that this is not an individual thing, it's kind of a team thing, do you remember that?

A: Yes.

Q: And right through that broadcast, it remained a team issue that you all supported. Isn't that correct?

A: Yeah ...

(Tr. 430) Joseph Guest and Hugh Fowler expressly testified that, as far as they were concerned, "Channel 6" acted as the group's "spokesperson." (Tr. 292-293, 335-336)

The broadcast to the public included the following allegations, some of which are true and some of which are false:

- MasTec and DirecTV charge customers for features they may never use.
- Technicians get back charged if they do not lie to customers.
- Telephone lines are not necessary for a DirecTV system.
- Telephone line connections only enhance service by allowing customers to order pay-per-view movies through the remote control.
- Telephone line connections are only a "convenience" to the customer.
- DirecTV and MasTec profit from every telephone line that is connected to a receiver.
- MasTec supervisors deduct \$5 from technicians' paychecks for every receiver that is installed without a telephone line connection.
- Technicians were told to tell customers that the receivers would blow up if the telephone lines are not connected.

- Technicians have to lie to the customers or they will lose money.

(GC 3(a), 3(b)) Although the technicians pledged support for the broadcast, at the trial they acknowledged that the broadcast contained false information. Specifically the former technicians admitted:

- It is not true that customers are charged for services “they may never use.” There is no charge to connect a telephone line that does not involve custom work. (Tr. 258-259, 417-418) In fact, the majority of telephone line connections are free and do not involve custom work. (Tr. 280)
- It is not true that technicians get back charged if they “don’t lie to customers.” Guest, Fowler and Harrison all testified that it was possible to connect telephone lines without lying to customers. (Tr. 259, 345, 418)
- It is not true that telephone line connections are only used for ordering pay-per-view movies through the remote control. (Tr. 260)
- It is not true that technicians are charged back for “every” receiver not connected to a telephone line [they are charged only if they connect less than 50%]. (Tr. 259-260, 345-346)
- It is not true that the technicians were told to lie to customers. (Tr. 259,415)

Additionally, technicians admitted to giving Alvarez the mistaken impression that they were seriously instructed to tell customers that the receivers would blow up if not connected to a telephone line. (Tr. 258)

During the month between the on-camera interview at Channel 6 and the May broadcasts, none of the technicians informed MasTec management that they had attended the taped meeting. (Tr. 265-267, 420) Nor did any technician approach management in an attempt to disassociate himself from what their colleagues said at the station. (Tr. 267, 364-365, 420, 431) They also did not seek to correct any of the false statements that had been made. (Tr. 265-267, 364-365, 420-421)

**2. MasTec and DirecTV become aware of the technicians' media contacts before the segment is broadcast.**

MasTec and DirecTV knew about the technicians' contacts with Channel 6 long before the May broadcasts. On March 30, the day the technicians left the office together to participate in the on-camera interview, Chris Brown and Helbert Villa heard a rumor that MasTec technicians were in the parking lot of Channel 6. (ALJD 10; Tr. 562-563) Brown and Villa drove by the station just as the technicians were leaving. (ALJD 10; Tr. 563-564) Brown contacted MasTec Senior Vice President, Mark Retherford, to tell him about the rumor and about what he and Villa saw when driving by the station. Retherford told Brown "not to worry about it," but to keep his "ear to the ground." (Tr. 144, 564)

Subsequent to March 30, Channel 6 reporter Nancy Alvarez made several attempts to contact MasTec and DirecTV management for comment on her interview with the technicians. (ALJD 10-11) Brown accepted a call from Alvarez in Orlando, and she asked whether the Company was "telling techs to lie" to customers. (Tr. 565) Brown referred Alvarez to Mark Retherford. (Tr. 565-566)

Retherford received a call from Alvarez as well, inquiring into the Company's position on the technicians' claims. (Tr. 145) As he explained in his testimony, Retherford "took notes on all her questions," and then drafted a detailed written statement with the help of the Company's Public Relations Officer and e-mailed it to Alvarez. (ALJD 11; Tr. 145; MT 7)

Around the same time, as a result of Alvarez's call, the DirecTV Public Relations Officer informed Vice President of Field Operations, Steven Crawford, that MasTec technicians in Orlando had been to a local television station complaining about telephone lines. (Tr. 71) Crawford testified that he did not do anything in response because he had



not yet seen any television broadcast. (Tr. 71-72)<sup>19</sup>

MasTec Senior Technical Supervisor, Helbert Villa, was working in the Orlando office one morning when Nancy Alvarez and a camera crew appeared at the office without warning or invitation. Alvarez asked Villa repeatedly on-camera if the Company was “telling techs to lie” to customers. (Tr. 605; MT 8(a), 8(b)) Villa responded by providing Alvarez with the corporate Human Resource telephone number, then peacefully asked Alvarez to leave. (Tr. 606)

Following Alvarez’s departure, Villa contacted Brown and told him what occurred. (Tr. 606) Neither Brown nor Villa attempted to further investigate the issue, (Tr. 606) and the ALJ acknowledged:

There is no evidence, or allegation, that either Brown, or any other MasTec supervisor, questioned any of the technicians about their visit to the TV station or took any action against them before the broadcast of the report made from these interviews.

(ALJD 10)

**G. WKMG Channel 6 Airs DirecTV’s “Dirty Little Secret.”**

On Friday, April 28, Chris Brown saw a “teaser” on Channel 6 advertising a story slated to air on Monday, May 1. (ALJD 11; Tr. 566; MT 8(a), 8(b)) The teaser opened by stating:

Reporter 1: “Why did over 30 employees of this major company [DirecTV] show up at Local 6?”

Interviewer: “So you’ve basically been told to lie to customers?”

Technician: “Yeah”

Reporter 2: “To tell the Problem Solvers about a dirty little secret.”

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<sup>19</sup> DirecTV’s Director of Public Relations, Robert Mercer, provided Alvarez with a written statement in response to her request for comment. (ALJD 11)

Technician: “Tell the customer whatever you have to tell them.”

Reporter 1: “That may be costing you money.”

(ALJD 11, 13-14; MT 8(a), 8(b))

Brown testified that the information on the teaser “looked deadly wrong,” and that he was “concerned for what customers might see.” (Tr. 566) Brown called his supervisor, Gus Rey, as well as Mark Retherford, and they directed him to start recording the Channel 6 news. (ALJD 14; Tr. 148, 566-567) Brown taped the broadcasts as directed.<sup>20</sup> (ALJD 14; Tr. 567-568)

Retherford saw the initial May 1 broadcast,<sup>21</sup> as well as the subsequent broadcasts on May 2 and 3 via the internet. (ALJD 14; Tr. 149) Retherford also provided Steve Crawford and others at DirecTV with the Channel 6 website link. (ALJD 14; Tr. 98) Retherford testified that he was “shocked” at the story, particularly because “they were pretty flippant about, you know, lying to customers...” (ALJD 14; Tr. 157-158)

Crawford, Retherford, Brown and Villa testified as to the specific lies contained in the broadcast:

- DirecTV never told technicians to lie to customers. (Tr. 74-75)
- DirecTV does not make any money off of the standard telephone installation. (Tr. 158)
- Telephone lines are necessary for the functionality of the DirecTV system. (Tr. 74-75, 158)
- Telephone lines are more than a mere “convenience.” (Tr. 104)
- MasTec never told technicians to lie to customers. (Tr. 104)

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<sup>20</sup> Brown testified that he recorded what he believed to be all of the broadcasts and he did not alter them in any way. (Tr. 568; MT 8(a)) Brown also created a transcript of the broadcasts which is accurate to the best of his knowledge and belief. (Tr. 568, MT 8(b))

<sup>21</sup> A transcript of the full May 1 broadcast appears in the ALJD at pages 11-13.

- Not every technician was charged back. (Tr. 106)
- Technicians were not charged back “for every non-responding receiver,” only those in excess of 50% of receiver installations. (Tr. 139, 158)
- MasTec does not receive additional profit for connecting the telephone line. (Tr. 158)

Crawford testified that he believed the broadcast was a “slam on DirecTV.” (Tr. 74) Crawford spoke with Retherford after the broadcast aired, and told him that he did not want the technicians who appeared in the broadcasts representing DirecTV. (ALJD 14; Tr. 63, 76)

Following the initial May 1 broadcast, Retherford investigated whether the technicians were properly taught the appropriate reasons for connecting the telephone lines. (Tr. 159-160) On May 2, Retherford asked Brown to identify all of the technicians appearing in the broadcasts. (ALJD 14; Tr. 98)

Retherford spoke with DirecTV management later on May 2 as well. (Tr. 148) They discussed the scope of the HSP contract – specifically that DirecTV has the right to determine who will represent their product. (Tr. 99-101) During that conversation, Crawford was very clear that DirecTV no longer wanted the technicians who appeared in the broadcasts to represent their product. (ALJD 14; Tr. 101)

On Wednesday morning, May 3, Retherford spoke with his boss, Gus Rey, and Chris Brown while they were all in Miami for a business meeting. (Tr. 148) Though the three of them discussed the situation, Retherford was solely responsible for the decision to terminate the technicians’ employment. (Tr. 101) He reached his decision based on a number of considerations:

It was very shocking to me to watch them disparage the customer and to mislead that way. And ultimately, I think I

analyzed lots of reasons why it was shocking to me, but they did what they did, and that, you know, threatened my relationship with my client and what else was I going to do with them? I could no longer send them in people's homes representing DirecTV, and they had showed up in this, disparaging the product in their uniforms, in their DirecTV marked van. That whole event made them – really gave them no option to properly represent the product anymore, you know, and go into people's homes. What else am I going to do with them?

(Tr. 160-161) Retherford instructed Brown to return to Orlando to separate the technicians who appeared in the television broadcasts. (ALJD 14; Tr. 148-149) Brown communicated to Villa that the decision had been made, and the technicians would be terminated on an “at will” basis. (ALJD 14; Tr. 569-570)

Villa began terminating the technicians' employment on the afternoon of Wednesday, May 3. (Tr. 609) He told the technicians, one by one, that they were terminated “at will” and collected Company belongings from them. (ALJD 14; Tr. 610) At no time did a technician volunteer to Villa that he was not a participant in the Channel 6 broadcasts, or that he disagreed with anything said in the broadcasts. (Tr. 610)

As a result of the broadcasts, MasTec received telephone calls from customers wanting to cancel their DirecTV service. (ALJD 14; Tr. 162) In addition, DirecTV brought in an alternative service provider to perform installations, service and upgrades in the Orlando market because MasTec did not have enough technicians to adequately complete the work they were contractually required to perform. (Tr. 162) In addition, the Florida Attorney General initiated an investigation in DirecTV's practices. (RM 8(a), 8(b))

#### IV. ARGUMENT

##### A. The ALJ Properly Found The Technicians Lost Protection Of The Act And MasTec Acted Lawfully When It Terminated Their Employment.

The central issue before the Board is whether MasTec violated the Act when it terminated the employment of the technicians appearing on the Channel 6 broadcasts in May 2006. MasTec submits that the ALJ's ruling on this issue is correct:

[T]he statements broadcast in the Channel 6 news story were so "disloyal, reckless, and maliciously untrue" as to lose the Act's protection.

(ALJD 19) Legally, the ALJ's ruling must be affirmed.

##### 1. The Applicable Legal Standard.

There is no dispute that the legal standard applicable to this case is that set forth in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953) ("*Jefferson Standard*") and its progeny. Those cases hold that employees generally have the right to seek public assistance from a third party in relation to an ongoing labor dispute. However, such conduct will lose the Act's protection when it is disloyal, reckless or maliciously false. *Five Star Transportation*, 349 NLRB No. 8 (Jan. 22, 2007), enf'd. 2008 WL 839758 (1<sup>st</sup> Cir. 2008) . Using this legal standard, the ALJ properly determined that MasTec did not violate the Act when it terminated the technicians that appeared on the Channel 6 broadcast, since their attitude was "flagrantly disloyal . . . manifested by public disparagement of the Respondent's product and undermining of their reputation."

As an aside, General Counsel argues that the ALJ erred in failing to find certain of MasTec's directives to technicians "were also part of the labor dispute." (GC pp. 16-17) However, the ALJ found that the first prong of the *Jefferson Standard* test was met in this

case: that the technicians' public appeal related to an ongoing labor dispute with MasTec. In this regard, GC's lengthy analysis of why certain alleged statements in this case are related to an ongoing labor dispute within the parameters of *Jefferson Standard* appears unnecessary and superfluous. The reality is that the narrow issue presented by General Counsel's exceptions is whether the second prong of the *Jefferson Standard* test is met: whether the technicians' conduct was disloyal, reckless or maliciously false.

## **2. The Technicians' Conduct Was Not Protected.**

The ALJ correctly found that the technicians lost the protection of the Act because their actions were "frankly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of the Respondents' product and undermining of their reputation." (ALJD 19) The ALJ's ruling is based on a wealth of record evidence.

First, the ALJ found that three of the employees who spoke on camera "made statements indicating that they were instructed to, or encouraged, to lie to customers," and that "[c]learly, such statements are highly inflammatory and damaging to Respondents' reputation." (ALJD 19) Furthermore, the ALJ found that the story's link between the lies to the customers and their paying for services they didn't need was "clearly inaccurate and misleading." (ALJD 19)

While the ALJ noted that a fourth statement by former technician Roy Selby would have been protected standing alone, (ALJD 19 n.23) the ALJ properly found that this statement was not enough to outweigh the inflammatory nature of the comments made by the other speakers and thus the overall tone of the broadcast. General Counsel makes much of Selby's lone potentially-protected comment, even while conceding the "Board evaluates communications to third parties *in their entirety and in context*." (GCB

13 (emphasis supplied)) In fact, and as further discussed herein, in reaching his Decision the ALJ properly evaluated the technicians' statements in their entirety and in the context of the broadcast in which the group voluntarily participated..

Second, the ALJ found that the evidence did not support the technicians' claims that they had to lie to customers in order to avoid the \$5.00 charge back. (ALJD 19) The General Counsel adamantly argues against this finding since, according to General Counsel, Respondents' previous statements to technicians amounted to an instruction to lie. Interesting, the General Counsel makes this argument even though his witnesses concede they were never actually told to lie. (GCB 19) To reach his conclusion, the General Counsel would have the Board read Respondents' statements completely out of context and with total ignorance of the ALJ's credibility determinations. For example, General Counsel argues: "Respondent DirecTV's instruction to tell customers that the connection to a telephone line was mandatory is . . . false, because the connection is not mandatory for the customers." (GCB 19) However, a review of GC 3(a) and 3(b) (the DirecTV training video and transcript from which this direction came), makes clear that technicians were not instructed to tell customers that the connection was mandatory for *them*, but that it was mandatory for the *technicians*: "some of the techs are just saying, look its mandatory from DirecTV that *we hook these phone lines up.*" (GC 3(a); 3(b) p.2) Moreover, even General Counsel concedes "[i]t is true that it was possible to convince customers to permit the connection of a telephone line without lying to them." (GCB 22)

General Counsel's characterization of Brown's joke about exploding receivers is likewise not supported by the record. General Counsel argues "Respondent MasTec Manager Brown's statement that technicians should tell customers that the receivers

would blow-up if not connected to a telephone line, notwithstanding that it was said in a joking manner, confirmed the message that technicians should lie to customers in order to get the receivers connected to telephone lines.” (GCB 19) The ALJ found, and General Counsel’s witnesses did not dispute, that Brown’s statement was, in fact, only a joke. The ALJ, crediting Brown’s testimony, further found that he “did not intend or expect any technician to say that to a customer.” (ALJD 19) It is also undisputed that no technicians actually ever told a customer their receiver would blow up if not connected to a telephone line.<sup>22</sup> (Tr. 305, 459)

Given the record evidence, including the technicians’ on-air comments viewed in their entirety and in context, the ALJ properly concluded “the employees’ attitude during the broadcast was ‘flagrantly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of [the Respondents’] product and undermining of their reputation.” (ALJD 19 (quoting *Five Star Transportation*, 349 NLRB No. 8, 4 (Jan. 22, 2007 and *Veeder-Root*, 237 NLRB 1175, 1177 (1978). Despite the ALJ’s appropriate application of the facts to the case precedent, General Counsel urges the Board to follow its decision in *Endicott Interconnect Technologies*, 345 NLRB 448 (2005) since, according to General Counsel, that case “illustrate[s] the Board’s approach” to these types of cases. (GCB pp. 13-14) Significantly, however, the D.C. Circuit vacated the Board’s decision in *Endicott* because the Board failed to analyze whether the employee communications in that case were disloyal. 453 F.3d 532 (D.C. Cir. 2006). After properly applying the legal standard, the Circuit Court in *Endicott* went on to find, in no uncertain terms, that the employee’s “communications were

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<sup>22</sup> As the ALJ accurately pointed out, Martinez chose to publicize this comment for no apparent reason other than to harm the reputation of his employer.” (ALJD 19)



unquestionably detrimentally disloyal.” *Endicott*, 453 F.3d at 537.<sup>23</sup>

The General Counsel’s argument that the technicians’ conduct in this case was protected fails for another reason. In urging reversal of the ALJ, General Counsel relies – not on the record evidence – but on his own post-hoc rationalization and characterizations of what his witnesses *really* meant by their testimony. For example:

- General Counsel argues that, given their supposed instructions from management, “the technicians would reasonably conclude that Respondent MasTec expected them to lie if necessary to get telephone lines connected.” (GCB 21) The General Counsel then goes on to acknowledge that this conclusion appears nowhere in the record. (GCB 21 (“The mere fact that the technicians may not have precisely expressed the fact that they felt they were being pressured to lie does not make their statements maliciously false.”))
- General Counsel argues that, even if Frank Martinez understood Chris Brown to be joking when he told the technicians to tell customers the receivers would blow up if not connected to a telephone line, “Martinez’ repetition of Brown’s instruction simply demonstrated his understanding, based on all of Respondent’s directives, that technicians were being encouraged to deceive and even lie to customers.” (GCB 21) The General Counsel’s assertion here is completely unjustified - Martinez was not a witness in this case, and there is no testimony anywhere in the record about “his understanding of [MasTec’s] directives.”
- General Counsel argues that “Fowler’s statement regarding having to lie to customers to avoid losing money was meant to illustrate the difficulty of getting a sufficient number of receivers connected to telephone lines...” (GCB 22) Fowler testified at length during the hearing. Significantly, not once did he say that his statement was really meant to illustrate the difficulty of getting a sufficient number of receivers connected to phone lines.

Had General Counsel elicited the testimony from his witnesses that he now wishes they had given when they were on the stand, subject to Respondents’ cross-examination, the General Counsel’s argument might have more credibility. General Counsel cannot now,

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<sup>23</sup> Vacation of the Board’s order in *Endicott* also precludes General Counsel’s argument that the technicians cannot be held liable for statements in the broadcast since they, like the former employee in *Endicott*, “obviously could not control what portion of [their] interview would be quoted or the precise context in which [their] statements might be framed.” (GCB pp. 14-15 (*quoting Endicott*, 345 NLRB at slip op. p. 4 n.12) )

however, make unsupported assertions as to what his witnesses *really* meant when they uttered their disloyal and disparaging statements on camera. The record in this case speaks for itself and supports the ALJ's legal and factual conclusions.

**3. There is no evidence (or reason) that the reporters' statements are not attributable to the technicians.**

General Counsel argues that the ALJ erred by relying in part on statements made by the reporter Nancy Alvarez and "editorial decisions made by Channel 6" in finding the technicians' conduct unprotected. (GCB 25) In essence, the General Counsel argues that the technicians cannot be held responsible for what aired on the broadcast. Again, however, the General Counsel's argument is not supported by the evidence supplied by his own witnesses.

The witnesses in this case made clear that they expressly sought out the media to act as their "spokesperson," and that Channel 6 and Alvarez in fact did act as their spokesperson. (Tr. 292-293, 335-336, 430) Moreover, the technicians at the hearing had every opportunity to disavow what was said in the broadcast. However, not a single technician claimed that he was misrepresented, taken out of context, or that the station or reporter in any way got the story "wrong." Rather, up to and including the time of trial – more than one year after the original broadcast – the technicians stood by the story. Accordingly, the General Counsel cannot now argue that the technicians were not accurately represented during the broadcast and are therefore not responsible for the resulting consequences of what occurred, particularly when his own witnesses clearly testified otherwise.

**4. The technicians' conduct was not protected because it advocated public pressure against DirecTV.**

While not specifically addressed by the ALJ, MasTec did not violate the Act

when it terminated the technicians because it was not required to sit idly by while its only customer was publicly disparaged by its employees. As has been long recognized:

It is a wrong done to the company for employees, while being employed and paid by a company, to engage in a boycott to prevent others from purchasing what their employer is engaged in selling and which is the very thing their employer is paying them to produce. An employer is not required, under the Act, to finance a boycott against himself.

*Hoover Co. v. NLRB*, 191 F.2d 380, 390 (6th Cir. 1951).

By arriving at the television station to meet with Nancy Alvarez in DirecTV vans and wearing DirecTV shirts to complain about what they necessarily suggested were DirecTV practices, the technicians clearly intended for the public to put pressure on DirecTV to halt what was characterized as unfair business practices. The purpose of the broadcast was clear – the technicians enlisted the assistance of the media to inflame the public by “exposing” what the reporters said was a “dirty little secret” and a “lie” about DirecTV that “cost customers money.”

In fact, the technicians’ plea had its intended effect. Mark Retherford testified that he spoke with customers personally who were angered by what they witnessed during the broadcast and wanted to cancel their service. (Tr. 162) Additionally, the Florida Attorney General initiated an investigation into DirecTV practices. (RM 8(a), 8(b))

The technicians succeeded in instigating public pressure on MasTec’s only customer in central Florida, causing serious harm to DirecTV and to MasTec. MasTec was not required to “finance a boycott against itself,” and was therefore privileged to terminate the technicians for actively instigating the public outcry. As Mr. Retherford testified, he was no longer in a position to have these employees represent DirecTV when

they went into customers' homes. As DirecTV was MasTec's only account in Orlando, Mr. Retherford's hands were very tied in regard to any other option.

**5. The ALJ Properly Found That All Of the Technicians Lost The Act's Protection.**

It is undisputed that at all times leading up to the March 30 visit to Channel 6, the technicians acted as a group. It is also undisputed that, on the morning of March 30, they met at the MasTec Orlando office and drove in a caravan to the television station in their DirecTV trucks and wearing their DirecTV uniforms. With respect to what occurred during the taping, the ALJ found the technicians acted as a group as well:

Although only two of the employees named in the complaint made disparaging comments in the broadcast (Fowler and Eriste), I find that the others who participated and were shown in the broadcast are equally culpable. Their appearance lent tacit support to the disloyal, disparaging and malicious statements made by the technicians who spoke. A reasonable person viewing the broadcast would perceive the employees as being in agreement since no one spoke up to clarify the damaging statements. The employees' mere presence is not different from the conduct of the employees in *Jefferson Standard* who distributed the disloyal handbill that was prepared by someone else, or the employees who did not sign the disparaging letter but authorized another employee to send it. *TNT Logistics North America, Inc.*, 347 NLRB No. 55 (July 24, 2006).

(ALJD 20)<sup>24</sup>

The ALJ's conclusions with respect to the concerted nature of the activity here are supported in the record. In fact, nearly all of the technicians' testimony concerning their

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<sup>24</sup> On January 22, 2008, after the ALJ issued his Decision in this case, the Sixth Circuit granted the alleged discriminatees' Petition for Review in *T.N.T. Logistics*. 513 F.3d 600 (6<sup>th</sup> Cir. 2008). The Court reversed the Board's finding that no Act violation occurred because the letter alleged to have lost the Act's protection was not written with actual malice, and therefore was not "maliciously false." In rendering its decision, the Court expressly declined to reach the issue of whether the alleged discriminatees could be held responsible for a statement they themselves did not make. *See id.* at 608. As the Sixth Circuit did not review this portion of the Board's Decision in *T.N.T.*, the analogy drawn by the ALJ in this case remains proper.

plan to obtain media assistance, their plan to travel to Channel 6 during work time, and their planned discussion topics for the reporter was framed in terms of “we.” At no time between the taping and the broadcast, or between the broadcast and the trial did any one of the technicians take any steps to disassociate himself from the statements in the broadcast. *See, e.g., Hoover Co. v. NLRB*, 191 F.2d 380 (6th Cir. 1951) (ruling the employees were acting in concert when they lost the Act’s protection because they took no steps to disassociate themselves from the group’s behavior). To the contrary, the technicians that testified at the hearing still support the broadcast, more than a year after their terminations. (Tr. 292-293, 335-336, 430) The totality of these facts underscores the ALJ’s conclusion that all of the technicians lost the Act’s protection, even though just a few spoke on camera.

Although General Counsel concedes that “[t]he Board evaluates communications to third parties in their entirety and in context,” (GCB 13) the General Counsel continues to assert that MasTec unlawfully terminated *all* of the technicians. General Counsel relies on a series of strike misconduct cases in support of his argument. (GCB 33) However, the General Counsel’s reliance on these cases is misplaced. The Board has never applied the standards utilized in strike misconduct cases to cases involving disloyal, reckless or maliciously untrue employee communications, despite the fact that individual versus group culpability has been an issue in several disloyalty cases dating back to and including *Jefferson Standard*.

Moreover, the General Counsel’s insistence that this case should be analyzed under the strike misconduct standard ignores the undisputed facts of this case:

- The technicians sought out Nancy Alvarez and Channel 6 to act as their spokesperson.

- The technicians did not protest when Martinez, Eriste, Fowler or Selby were given the opportunity to speak on camera.
- Following the March 30 interview, not one of the technicians attempted to contact Channel 6, Nancy Alvarez, MasTec or DirecTV to clarify or retract what was said at the taping; nor did any technician take these steps following the May broadcasts.
- At the hearing, the technicians testified that they, more than one year after the broadcasts, still support its content.

Given the extended timeframe since the broadcast taping more than one year before the trial, General Counsel's argument that "the non-speaking technicians had no real opportunity to disavow statements made by Martinez, Fowler, and Eriste because reporter Alvarez asked the questions and decided who to interview," (GCB 32) is disingenuous at best.

Moreover, General Counsel presented five former technicians at the hearing to support its argument that *all* technicians were protected by the Act. The General Counsel cannot now argue that those same five people, or some other arbitrary portion of the larger group, retained the Act's protection while others did not. In fact, the General Counsel opens its Brief in Support of Exceptions by characterizing this case as one in which group activity sits at the heart. General Counsel writes:

After Respondent MasTec refused to eliminate or change the non-responder policy in reply to the technicians' concerted complaint, the technicians concertedly sought public support in their labor dispute with MasTec by contacting WKMG-TV Channel 6 (Channel 6).

(GCB 1)<sup>25</sup> General Counsel cannot assert that this case centers on group activity, and at the same time argue the technicians should be subject to differing levels of culpability,

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<sup>25</sup> General Counsel also argues later in its brief that former technician Joseph Guest, who was not back-charged for failing to connect phone lines, did not attempt to mislead the public when he raised his hand indicating otherwise, rather he was simply "expressing solidarity with his co-workers." (GCB 23)

particularly where, as here, the *individual* technicians still stand behind the actions of the *group*. The ALJ correctly found that all of the technicians appearing in the Channel 6 broadcast lost the protection of the Act

**B. The ALJ Did Not Err By Refusing To Order A Nationwide Notice Posting In This Case.**

General Counsel raises one final issue in its exceptions. As a remedy for MasTec's maintenance of an overbroad confidentiality, solicitation and distribution policy in this case, the ALJ ordered MasTec to rescind the policy and to notify all employees that those rules are no longer in effect. (ALJD 20)

In its Brief in Support of Exceptions General Counsel argues:

Because Respondent MasTec's employee handbook and the unlawful rules contained therein were maintained throughout the United States, a notice posting limited to its Orlando facility will not adequately remedy the maintenance of unlawful rules by Respondent MasTec.

(GCB 35) General Counsel's argument in favor of a nationwide notice posting, like its other arguments, fails to take into account the record evidence.

MasTec entered into evidence both the relevant 2006 handbook rules, (RM 10) as well as newly-implemented rules from its 2007 handbook. (RM 9) At the hearing, MasTec Senior Vice President Mark Retherford testified that the 2007 handbook supplanted the 2006 handbook, and that it was, at the time of the hearing in July 2007, being given out to all the technicians. (Tr. 163)

Although the ALJ found the 2006 handbook provision violated the Act, he did so "in the absence of specific evidence showing that the new rule was in fact communicated to the affected employees, or that they were informed that the old rules were being rescinded." (ALJD 5) Commensurate with this finding, the ALJ ordered simply that

MasTec rescind the offending rule and notify all employees that they had done so. (ALJD 20) Compliance with this order can be easily monitored and confirmed through the Region 12 Compliance Officer. A nationwide notice posting is therefore unnecessary.

**C. The ALJ Should Not Have Revoked MasTec's Subpoena To WKMG Channel 6<sup>26</sup>**

The ALJ properly found that MasTec did not violate the Act when it terminated the technicians for their concerted participation in the Channel 6 broadcast. However, should the Board find that liability in this case turns on the individual technicians' levels of participation in the broadcast as General Counsel urges, MasTec was entitled to the various materials it subpoenaed from Channel 6.<sup>27</sup>

In determining whether information sought from a media outlet must be produced in an unfair labor practice case, the Board evaluates whether the information sought is relevant and whether it can be obtained from other sources. *See Valley Camp Coal Co.*, 265 NLRB 1683, 1684 (1982). The information MasTec sought met these requirements.

The Complaint in this case alleges, in relevant part, that MasTec terminated the technicians because of their "attendance and participation in an interview by a television reporter [Nancy Alvarez] at the premises of television station WKMG TV-6 in Orlando, Florida." (Complaint ¶ 7(b))

Finding in favor of WKMG's Petition to Revoke, the ALJ ruled in relevant part:

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<sup>26</sup> MasTec argued for dismissal of WKMG's petition to revoke MasTec's subpoena on timeliness grounds, as it was filed 48 days after service and well beyond the time provided in the Board's Rules and Regulations § 102.31(b) (setting a 5-day time limit for petitioning to revoke a subpoena). (RM 2(b), pp. 1-2) The ALJ acknowledged the Petition was untimely. (RM 2(c), p. 2) WKMG's Petition should have been dismissed for this reason alone.

<sup>27</sup> Such material is also necessary to the extent that the Board finds merit in General Counsel's argument that the technicians were improperly terminated for statements made in the broadcast over which they had no "editorial control."



The Respondents argue that they need the information sought, which includes . . . items prepared in connection with the report whether or not it was aired, to determine the degree of participation of each employee in the making of the news story and to determine whether the employees made disparaging remarks or other statements that were unprotected. According to the Respondents, “the essence of this case is what happened at the TV station.” I do not agree with this statement. What is critical is what was broadcast, on TV, in print or the internet because it is the public airing of unprotected activity by the employees that would cause them to lose the protection of the Act. Anything that might have been communicated to the reporter which was “left on the cutting room floor” would not be relevant because it would be information not in Respondent’s knowledge at the time it made the decision to terminate the employees.

(MT 2(c), p. 3) (Footnote omitted)

In fact, MasTec agrees with the ALJ’s assessment of the legal standard applied in this case and how it was actually applied in the Decision. However, if the Board finds that liability in this case comes down to the individual technicians’ levels of participation – as General Counsel erroneously argues that it does – then the information sought in the subpoena is certainly relevant if not critical to this inquiry. For these reasons and those more fully set forth in MT 2(b), MasTec believes that WKMGs Petition to Revoke MasTec’s and DirecTV’s Subpoenas was improperly granted.

## **V. CONCLUSION**

General Counsel’s exceptions to the ALJ’s Decision should be denied and the Decision affirmed, as MasTec did not violate the Act when it terminated the technicians who appeared on Channel 6 and disparaged MasTec and its only customer in the Orlando market.

General Counsel has attempted to paint the picture of a group of wronged technicians who, after innocently voicing opposition to a company pay practice, were

terminated. General Counsel's characterization of the events giving rise to this case is not supported by the undisputed facts.

It is undisputed that the technicians voiced strong opposition to MasTec's responder pay practice as far back as January 2006, approximately three and a half months before their terminations. The record is replete with evidence of the technicians' push-back throughout the early months in 2006, including incidents of cursing at managers and threatened refusals to perform the work they were being paid to perform. And while these incidents formed the basis of Section 8(a)(1) Complaint allegations, the ALJ found no violations and the General Counsel did not except to these findings.

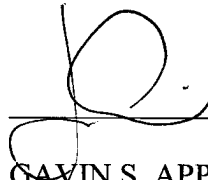
It is also undisputed that MasTec was aware on March 30 and thereafter that the technicians sought out media publicity. Moreover, MasTec and DirecTV were on notice during the month of April that the forthcoming Channel 6 story was related to an allegation that the Company was telling technicians to "lie to customers." Still, MasTec took no steps to identify the technicians involved in the story or identify what was said to the television station. More importantly, none of the technicians involved took steps to distance themselves from what their colleagues told the reporter on-tape.

The Channel 6 interview aired in May, and technicians appeared on television in their DirecTV trucks and uniforms and told current and potential customers in the Orlando area that they were forced to "lie to customers" or risk non-payment. It was only at that point that MasTec found itself in the position of having to send these same technicians into customers' homes in order to complete the job that DirecTV required *MasTec* to do. MasTec logically and lawfully determined that it could not send a technician into a customer's home as the face of MasTec and DirecTV, who just days

before appeared on television saying that he was required to lie to customers as part of the job.

The technicians in this case were terminated because their conduct at the television station was disloyal, reckless and maliciously untrue, and because it disparaged their employer, MasTec, and MasTec's only customer in the Orlando market. For all of the foregoing reasons, MasTec respectfully requests that the Board affirm the ALJ's decision that the Company did not violate the Act when it terminated the technicians for their participation in the Channel 6 news broadcast.

Respectfully submitted,



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Dated: April 14, 2008

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**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

|                                    |   |                         |
|------------------------------------|---|-------------------------|
| <b>MASTEC ADVANCED</b>             | ) |                         |
| <b>TECHNOLOGIES, a division of</b> | ) |                         |
| <b>MASTEC, INC.</b>                | ) | <b>Case 12-CA-24979</b> |
|                                    | ) |                         |
| <b>and</b>                         | ) |                         |
|                                    | ) |                         |
| <b>JOSEPH GUEST, an Individual</b> | ) |                         |
|                                    | ) |                         |
| <b>DIRECTV, INC.</b>               | ) | <b>Case 12-CA-25055</b> |
|                                    | ) |                         |
| <b>and</b>                         | ) |                         |
|                                    | ) |                         |
| <b>JOSEPH GUEST, an Individual</b> | ) |                         |

**CERTIFICATE OF SERVICE**

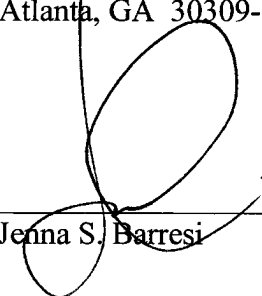
I hereby certify that on April 14, 2008, the foregoing *Mastec Advanced Technologies' Answering Brief To Exceptions Made By The General Counsel To The Administrative Law Judge's Decision* was served upon the following persons by overnight mail.

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